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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN BLANCAS,

Defendant and Appellant.

C046258

(Super. Ct. No.
NCR62148)

Defendant Martin Blancas pleaded guilty to transporting a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and driving with a suspended license (Veh. Code, § 14601.1, subd. (a)) in exchange for dismissal of the remaining counts and allegations against him. The court denied probation and sentenced him to prison for the midterm of four years and to jail for a concurrent 180 days.

On appeal, defendant contends the trial court abused its discretion by denying probation, or, in the event the claim is waived, his counsel was ineffective. We affirm the judgment.

FACTS¹ AND PROCEDURAL BACKGROUND

On December 22, 2003, defendant was stopped by a Corning police officer because his car had a faulty brake lamp. The cover at the base of the car's gearshift was loose. When the officer looked underneath, he discovered one bindle containing 5.2 grams of marijuana, a second bindle containing 17, 10-milligram oxycodone pills, and a third bindle containing seven 20-milligram oxycodone pills. Another oxycodone pill was found on the floorboard.

Defendant told the officer he did not have a prescription for the pills and knew it was illegal to have them. He stole them from a friend to relieve his back pain and did not intend to sell them. He had put the pills and marijuana under the gearshift cover when stopped by the officer.

The trial court received and reviewed the probation report prior to sentencing. The report noted defendant was eligible for probation and reviewed the factors affecting the decision to grant or deny probation. The report enumerated the following circumstances relating to the crime: the offenses differed somewhat from similar crimes and defendant had a small quantity of marijuana, which, along with the pills, he carried concealed in his car (Cal. Rules of Court, rule 4.414(a)(1) [further undesignated rule references are to the California Rules of Court]); defendant was not armed (rule 4.414(a)(2)); defendant

¹ Because defendant pleaded guilty, our statement of facts is taken from the probation report.

inflicted no injury or harm (rule 4.414(a)(4)); defendant was the sole participant (rule 4.414(a)(6)); defendant did not commit the offenses because of an unusual circumstance or great provocation (rule 4.414(a)(7)); defendant demonstrated some criminal sophistication in that he carried the drugs concealed under the gearshift cover of his car (rule 4.414(a)(8)); defendant told officers he stole the drugs from a friend (rule 4.414(a)(9)).

The probation report enumerated the following circumstances relating to defendant: his brief record of offenses indicates a developing pattern of regular drug-related criminal conduct (rule 4.414(b)(1)); he has never been on probation and it appears his performance on parole was satisfactory (rule 4.414(b)(2)); he is willing to abide by terms of probation (rule 4.414(b)(3)); his age, education, health, and other factors did not argue against his ability to comply with the reasonable terms of probation, but he is in the country illegally and is likely to be returned to Mexico (rule 4.414(b)(4)); he has three young children who may be financially and emotionally affected by his imprisonment (rule 4.414(b)(5)); he has a felony record and would suffer no further limitations arising from his current convictions (rule 4.414(b)(6)); he is not especially remorseful (rule 4.414(b)(7)); he now has two convictions for transporting drugs and is a danger to the public if not imprisoned (rule 4.414(b)(8)).

The report noted defendant had a 1991 conviction for misdemeanor shoplifting, a 1999 conviction for misdemeanor

possession of drug paraphernalia, and a 2000 conviction for transportation of methamphetamine, for which he was sentenced to three years in prison.

Defendant told the author of the probation report he stole, from a disabled woman for whom he and his wife were caring, the oxycodone pills, ostensibly, to alleviate back pain caused by hard work in the strawberry fields. The probation report recommended the court deny probation and commit defendant to state prison.

At the sentencing hearing, the trial court stated its tentative decision to follow the recommendation in the probation report. Defense counsel urged the court to place defendant on probation, noting this was an unfortunate situation where defendant's actions hurt the victim, his children, and his wife; defendant understood his immigration status may preclude him from successfully completing probation; and, contrary to the probation officer's views, he was extremely remorseful for his actions.

The court noted defendant had a small quantity of marijuana with the pills, which were concealed under the gearshift cover, indicating some criminal sophistication. It also noted defendant's brief criminal history showed a developing pattern of regular drug-related criminal conduct, his felony record meant he would suffer no further limitations arising from his present conviction, and he has suffered his second conviction for transporting drugs and is a danger to the public if not

imprisoned. The court found it unlikely defendant would succeed on probation and denied probation.

DISCUSSION

Defendant contends the trial court abused its discretion by denying probation. Specifically, he claims the court improperly considered the crime sophisticated, improperly relied on defendant's prior felony conviction for transporting drugs, and "improperly failed to weigh and consider the mitigating circumstances that weighed against a state prison term." In response to the People's assertion of waiver, defendant in his reply brief contends his counsel was ineffective for not raising these specific objections. We affirm the judgment.

To preserve a claim the trial court relied on improper sentencing factors, a defendant must object at the sentencing hearing on the specific grounds he asserts on appeal. (See *People v. de Soto* (1997) 54 Cal.App.4th 1, 8-9; *People v. Scott* (1994) 9 Cal.4th 331, 352-353.) Defendant failed to object the trial court improperly relied on the sophistication with which the crime was carried out and his prior conviction to deny probation and should have given weight to certain mitigating factors. Thus, he has forfeited his right to appellate review of the issue. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 ["forfeiture" is the correct legal term to describe the loss of the right to raise an issue on appeal due to the failure to raise it in the trial court].)

Realizing the issue may have been forfeited, defendant in his reply brief asserts his counsel was ineffective for failing

to adequately preserve defendant's right to contest his prison sentence. Defendant's failure to raise this claim of error in his opening brief waives his contention. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10; *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.) In any event, defendant's claim fails on the merits, as the court relied on proper factors in denying probation and therefore, defendant has failed to demonstrate counsel's performance was deficient. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692 [80 L.Ed.2d 674, 693, 696].)

Trial courts are vested with broad discretion in determining whether or not to grant probation. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 825.) A defendant bears a heavy burden when challenging a trial court's decision not to grant probation because the court's sentencing choice constitutes an abuse of discretion only where it is clearly shown to exceed the bounds of reason. (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1225.)

Defendant argues his concealment of drugs in the gearshift and his possession of oxycodone pills and marijuana were not the result of criminal sophistication because he hid the drugs spontaneously, had a "miniscule" amount of marijuana, and took the pills to alleviate back pain. Defendant's argument is unavailing. Regardless of whether defendant's actions were spontaneous or the amount of marijuana "miniscule," he concealed the marijuana and oxycodone pills in the gearshift of the car to hide them from police. The court properly found the manner in

which the crimes were committed demonstrated sophistication.

(Rule 4.414(a)(8).)

Defendant's argument the court could not rely on his prior felony conviction for transporting methamphetamine as indicating a pattern of behavior fares no better. Defendant committed the instant offenses after he was sentenced in 2000 to a three-year prison term for transporting methamphetamine. Moreover, on this occasion he was found with two different types of drugs. The court properly concluded defendant's record indicated "a developing pattern of regular drug-related criminal conduct."

(Rule 4.414(b)(1).)

Defendant also contends there were "compelling circumstances in mitigation that favored a grant of probation in this case," including those listed in the probation report and faults the court for "not adequately address[ing] the compelling circumstances in mitigation" The court is not required to state its reasons for rejecting a mitigating factor. (*People v. Simon* (1983) 144 Cal.App.3d 761, 766-767.) Moreover, we presume the mitigating factors are rejected when a grant of probation is rejected where, as here, the court read the probation report enumerating the mitigating factors. (See *People v. Jackson* (1980) 103 Cal.App.3d 635, 639.)

Lastly, defendant claims the court did not adequately consider his drug abuse as a factor in mitigation, citing his letters of reference documenting his success overcoming his drug addiction after his incarceration for transporting methamphetamine. Defendant ignores that after his incarceration

he was caught concealing two different types of drugs that were illegal for him to possess. Defendant has continued his criminal conduct, including theft from a disabled woman in his care, to support his pattern of drug abuse and therefore, the court properly did not consider this factor as mitigating in favor of a grant of probation. (See *People v. Reyes* (1987) 195 Cal.App.3d 957, 963.)

DISPOSITION

The judgment is affirmed.

_____, J.
NICHOLSON

I concur:

_____, J.
RAYE

I disagree with the conclusion that the act of concealing a small amount of drugs under the gearshift cover demonstrates criminal sophistication. However, I agree that the judgment must be affirmed because the other circumstances support the trial court's exercise of discretion to deny probation.

_____, P.J.
SCOTLAND